



August 20, 2018

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278 & CG Docket No. 18-152

Dear Ms. Dortch:

This *Ex Parte* Notice relates to a meeting on August 16, 2018 between myself, my colleague Carolyn Carter, and the following staff members of the Federal Communication Commission's (FCC or Commission) Bureau of Consumer and Governmental Affairs: Kristi Thornton, Dan Margolis, Karen Schroeder, Richard Smith, and Mark Stone. At this meeting, NCLC presented the positions expressed in comments to the Federal Communications Commission in the current Telephone Consumer Protection Act (TCPA) proceeding¹ on behalf of forty-one national and state public interest and legal services organizations.

During the meeting we discussed all of the issues included in the attached outline, as well as the following points:

1. Texts are covered by the TCPA's cell phone protections only if there is a broad interpretation of the definition of an ATDS.

As texts do not involve either a prerecorded or an artificial voice, the TCPA's restrictions on calls to cell phones apply to texts only if they were made using an automated telephone dialing system (ATDS). If the FCC issues a definition of ATDS that is as narrow as the calling industry urges, the consequence will be that automated texts will no longer be subject to these consumer protections. Texters, even those sending *en masse* texts for telemarketing purposes, would no longer be required

¹ Comments of National Consumer Law Center on behalf of its low-income clients and forty-one other national and state public interest groups and legal services organizations, *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act and Interpretations in Light of the ACA International Decision, CG Dockets 02-278 and 18-152 (June 13, 2018) [hereinafter NCLC Primary Comments], available at <https://ecfsapi.fcc.gov/file/106131272217474/Comments%20on%20Interpretation%20of%20TCPA%20in%20Light%20of%20ACA%20International.pdf>.

to have consent before being sent to cell phones—which would mean that consumers would no longer have the right to stop the texts either (although the Do Not Call rule would still apply if the cell phone was for personal use).

2. There is no legal authority that authorizes the relinquishment of a federal consumer protection by signing a contract.

Callers have recently begun inserting “consent” provisions in form agreements that purport to authorize the use of automated equipment to contact consumers at any number furnished by the consumer or otherwise obtained by the creditor. The Third Circuit has held that this consent can be revoked, because “the ability to use an autodialing system to contact a debtor is plainly not an essential term to a credit agreement.”² By entering into a contractual relationship with a seller, a consumer does not waive the right to revoke consent to receive autodialed or prerecorded cell phone calls.³ The Ninth Circuit,⁴ the Eleventh Circuit,⁵ and lower court decisions⁶ have followed the Third Circuit.

In rejecting the idea that consent cannot be revoked, one court explained:

[The defendant] has not pointed to any legal authority giving parties permission to contract around the TCPA. If they could, one imagines that every company in the nation—from Dell Financial and State Farm Bank, to every student loan provider, to every catalog sales company—would amend their contracts to require customers to waive every right their customers currently have. The lack of authority suggests that no such race to the bottom is permitted.⁷

² Gager v. Dell Fin. Servs., L.L.C., 727 F.3d 265, 273–274 (3d Cir. 2013).

³ *Id.* at 274.

⁴ Van Patten v. Vertical Fitness Grp., 847 F.3d 1037, 1047–1049 (9th Cir. 2017) (when phone number provided by consumer in a contract for gym membership was used as the basis for consent to be called, revocation was permitted).

⁵ Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014). *Accord* Schweitzer v. Comenity Bank, 866 F.3d 1273 (11th Cir. 2017) (reiterating that consent can be revoked orally, and holding that it can be partially revoked).

⁶ Ammons v. Ally Fin., Inc., ___ F. Supp. 3d ___, 2018 WL 3134619, at *10–11 (M.D. Tenn. June 27, 2018) (detailed analysis); Ginwright v. Exeter Fin. Corp., 280 F. Supp. 3d 674, 683 (D. Md. 2017) (rejecting argument that a prohibition on later revocation of consent can arise from a “boilerplate consent provision” in a contract); Cartrette v. Time Warner Cable, Inc., 157 F. Supp. 3d 448 (E.D.N.C. 2016); Skinner v. Bluestem Brands, Inc., 2015 WL 4135269 (S.D. Miss. July 8, 2015) (rejecting argument that consumer who consented in the credit agreement to receive autodialed calls to her cell phone has no right to revoke that consent); Berg v. Verizon Wireless, 2013 WL 8446598 (W.D. Wis. June 21, 2013) (rejecting argument that consumer cannot revoke consent because her consent to receive autodialed calls was part of the consideration for the original transaction; “Nothing in this broad language suggests that consumers who consent initially in the context of a contractual relationship should be treated differently under the statute.”). *See also* Patterson v. Ally Fin., Inc., 2018 WL 647438 (M.D. Fla. Jan. 31, 2018) (creditor cannot by contract limit consumer to written revocation of consent).

⁷ Skinner v. Bluestem Brands, Inc., 2015 WL 4135269, at *3 (S.D. Miss. July 8, 2015).

However, a 2017 Second Circuit decision holds erroneously that the consumer’s consent is irrevocable when it is part of a binding contract—in the particular case, a vehicle lease.⁸ The Second Circuit decision fails to give appropriate weight to the FCC’s broad 2015 ruling that, “[w]here the consumer gives prior express consent, the consumer may also revoke that consent.”⁹ The Commission’s 2015 ruling was unequivocal, without qualifications or conditions, and cannot reasonably be construed as dependent on how consent was originally provided. Indeed, the Commission’s ruling also explicitly rejected the argument that callers can limit the means by which a consumer may exercise the right to revoke consent.¹⁰

The Second Circuit’s decision is also erroneously premised on the belief that no other circuits had addressed the question of revocation of contractual consent,¹¹ when the Third Circuit had explicitly allowed revocation of consent that the consumer had provided in an application for open-end credit.¹² The application is the only document signed by a consumer in an open-end consumer credit transaction and is, just like the vehicle lease at issue in the Second Circuit case, the document by which the consumer binds himself or herself to the terms of the contract.

Two district courts have explicitly declined to follow the Second Circuit’s decision, noting its inconsistency with the FCC’s ruling.¹³ In both district court cases, the consent provision was contained in consumer credit contracts.

The D.C. Circuit’s 2018 decision in *ACA International*¹⁴ strengthens the conclusion that consent obtained as a contract term can be revoked. The decision states: “It is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent.”¹⁵

⁸ *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017). *Accord* *Few v. Receivables Performance Management*, 2018 WL 3772863 (N.D. Ala. Aug. 9, 2018) (agreeing with *Reyes*); *Barton v. Credit One Fin.*, 2018 WL 2012876 (N.D. Ohio Apr. 30, 2018) (following *Reyes*).

⁹ *In re Rules & Regulations Implementing the Telephone Consumer Prot. Act of 1991*, No. 02-278, Report & Order, 30 F.C.C. Rcd. 7961, at ¶ 62 (July 10, 2015). *See* *Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674, 683 (D. Md. 2017) (declining to follow *Reyes*; noting its inconsistency with FCC’s ruling).

¹⁰ *In re Rules & Regulations Implementing the Telephone Consumer Prot. Act of 1991*, No. 02-278, Report & Order, 30 F.C.C. Rcd. 7961, at ¶¶ 66–67 (July 10, 2015).

¹¹ *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 56 (2d Cir. 2017) (“*Reyes*’s appeal presents a different question, which has not been addressed . . . by any federal circuit court of appeal”).

¹² *Gager v. Dell Fin. Servs., L.L.C.*, 727 F.3d 265 (3d Cir. 2013). *See also* *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014) (agreeing with *Gager* and allowing revocation of consent where consumer had provided a phone number as part of her credit card application; court does not indicate whether that application included a clause allowing calls).

¹³ *Ammons v. Ally Fin., Inc.*, ___ F. Supp. 3d ___, 2018 WL 3134619, at *10–11 (M.D. Tenn. June 27, 2018) (detailed analysis); *Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674, 683 (D. Md. 2017).

¹⁴ *ACA Int’l v. Fed. Comm’n’s Comm’n*, 885 F.3d 687 (D.C. Cir. 2018).

¹⁵ *Id.* at 708.

Method of revocation. A related issue regarding revocation of consent is whether the *method* of revoking consent can be limited or controlled by the terms of a contract in which consent was granted. As noted above, the weight of authority is that consent can be revoked even when that consent has been made a term in a contract. One district court decision held that a contract cannot impose a requirement that revocation of consent be in writing.¹⁶ At our meeting on August 16, we urged the FCC to take steps to prevent callers from specifying methods of revocation that would hinder consumers' right to revoke consent to receive robocalls. Revocation of consent should be simple, free, and easily accessible.

No waiver of consumer protections permitted. The idea that consumers cannot revoke contractual consent to receive robocalls would be equivalent to allowing consumers to waive their right to consent. There are numerous cases holding that similar consumer rights in other federal statutes, such as the Fair Debt Collection Practices Act (FDCPA) and the Truth in Lending Act (TILA), cannot be waived by clauses inserted into contracts.

As the Ninth Circuit noted in relation to a claim that the consumer had waived consumer protections provided under the FDCPA:

Out of an abundance of caution, we further note what should be obvious: a consumer's consent cannot waive protection from the practices the FDCPA seeks to eliminate, such as false, misleading, harassing or abusive communications. Permitting such a waiver would violate the public policy goals pursued by the FDCPA.¹⁷

Similarly, there have been numerous findings that the consumer protections provided by TILA cannot be waived in consumer contracts. The reasoning is that any predispute waiver of a TILA claim is unenforceable because a private right that affects the public interest may not be waived or released if doing so would be contrary to the purpose of the statute.¹⁸ A waiver or release in a credit agreement that discharges a creditor from any claims arising out of a transaction does not waive or release claims against the creditor for TILA violations.¹⁹ Such a form waiver would also likely not meet the standard criterion that a waiver should be a voluntary relinquishment of a known right.²⁰

¹⁶ *Patterson v. Ally Fin., Inc.*, 2018 WL 647438 (M.D. Fla. Jan. 31, 2018) (creditor cannot by contract limit consumer to written revocation of consent).

¹⁷ *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1171 n.5 (9th Cir. 2006); *Accord Spears v. Brennan*, 745 N.E.2d 862 (Ind. Ct. App. 2001) (There is no authority for the proposition that consumers may waive the protections of the FDCPA); *Oglesby v. Rotche*, 1993 WL 460841, at *10 (N.D.Ill. Nov.5, 1993); *Blakemore v. Pekay*, 895 F.Supp. 972, 983 (N.D.Ill.1995), (In light of . . . the broad remedial purpose of the FDCPA, the court does not find waiver).

¹⁸ *Taub v. World Fin. Network Bank*, 950 F. Supp. 2d 698, 703 (S.D.N.Y. June 21, 2013) (quoting *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704, 65 S. Ct. 895, 89 L. Ed. 1296 (1945)).

¹⁹ *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178 (11th Cir. 1982); *Abercrombie v. Wells Fargo Bank*, 417 F. Supp. 2d 1006 (N.D. Ill. 2006) (contract clause requiring consumer to give creditor the opportunity to correct any violations is invalid; it would gut TILA because a consumer who received corrected disclosures after having signed the contract would be unable to use them to shop for credit).

²⁰ *Mills v. Home Equity Group, Inc.*, 871 F. Supp. 1482 (D.D.C. 1994) (work-out agreement on defaulted loan negotiated by attorney that purported to waive TILA claims did not waive the consumer's right to

Waivers of TILA's substantive requirements rather than the manner of enforcing them are particularly disfavored.²¹ Indeed, the CFPB has stated that TILA protections cannot be waived except in the narrow circumstances specifically identified by Regulation Z.²²⁷

3. The Debt Collection Rule should be finalized and implemented immediately.

In section 301(b) of the Budget Amendment, Congress expressly directed the FCC to issue regulations to implement the amendment within a specific timeline:

Not later than 9 months after the date of enactment of this Act, the Federal Communications Commission, in consultation with the Department of Treasury, shall prescribe regulations to implement the amendments made by this section.

The word “implement” means: “to put into effect according to or by means of a definite plan or procedure.” Yet although the FCC issued regulations in 2016, in early 2017 it withdrew its request that OMB approve them. As a result, the FCC has failed to follow the clear directives from Congress in section 301(b).

While the rules that Congress has mandated sit in limbo, student loan collectors are harassing debtors and non-debtors relentlessly in the apparent belief that they can do so with impunity. In June 2017, the National Consumer Law Center, joined by the Center for Responsible Lending, Consumer Federation of America, Public Citizen, Public Knowledge, and Higher Ed, Not Debt, collectively representing millions of student loan borrowers and other consumers, formally filed a request for an enforcement action by the FCC against Navient Solutions, LLC for massive and continuous violations of the TCPA against student loan debtors.²³ The enforcement request

exercise her extended rescission right; to be valid, she would have had to know she had it, and waived it explicitly).

²¹ *Abercrombie v. Wells Fargo Bank*, 417 F. Supp. 2d 1006 (N.D. Ill. 2006). See also *Zohbe v. Ameriquist Mortgage Co. (In re Zohbe)*, 2012 WL 1297968, at *3 (N.D. Ga. Mar. 30, 2012) (releases of TILA claims have rarely been enforced; statutory right that affects public interest may not be released if release would contravene statutory policy); *Stewart v. BAC Home Loans Servicing, L.P.*, 2011 WL 3510909 (N.D. Ill. Aug. 10, 2011) (consumer's rescission was timely even though it came nearly three years after consummation and at a point when lender was bankrupt, so waiver, estoppel, and laches are not a defense, but assignee may raise consumer's delay as factor affecting damages).

²² 75 Fed. Reg. 7658, 7780 (Feb. 22, 2010) (“Consumer groups also requested that—in order to prevent creditors from misleading consumers into consenting to practices prohibited by Regulation Z—the Board adopt a provision affirmatively stating that the protections in Regulation Z cannot be waived or forfeited. However, as above, this request incorrectly assumes that creditors are generally permitted to engage in practices prohibited by Regulation Z in these circumstances. There is no such general exception to the provisions in Regulation Z. Instead, the Board has expressly and narrowly defined the circumstances in which a consumer's consent or request alters the requirements in Regulation Z.... For this reason, the Board does not believe that the requested provision is necessary.”).

²³ Enforcement Request by National Consumer Law Center on behalf of its low-income clients, the Center for Responsible Lending, Consumer Federation of America, Public Citizen, Public Knowledge, and Higher Ed, Not Debt, that the FCC initiate enforcement action against Navient Solutions, LLC for massive and continuous violations of the Telephone Consumer Protection Act against student loan debtors (June 12,

describes numerous, repeated and deliberate flouting of the strictures of the TCPA, causing harm to student loan debtors and their families.²⁴ For example, between 2014 and June 2017, there were over 18,389 complaints reported to the Consumer Financial Protection Bureau just about Navient’s practices. Of those complaints, 599 are specifically classified as relating to “Communication Tactics.” These complaints include information about the following types of abuses that Navient, as a student loan servicer, routinely used to harass consumers:

- “I have requested 5 times that Navient not call my home or my cell phone. I am receiving at least 10 calls a day at all times on both numbers. When I do answer, it is usually an automated system.”
- I got called from the same number 14 times in a 30 minutes period on XX/XX/2017. I got called 14 times total on XX/XX/2017 and 6 times on and 7 times on XX/XX/2017. . .
- Navient continues to call my phone multiple times daily. Although I am behind on my payments I did contact the company in attempts to set up a payment plan and was told nothing is available to me. The calls have continued and when I asked that the calls end I was told they would continue until a payment plan was arranged. I expressed my frustration with the harassing calls. The company will not work with me on my past due amount but also will not cease the calls.
- This company has called past co-workers, childhood friends, and mother in law. Some of these people I haven't spoken to in years nor know their phone numbers myself.
- “Navient calls me 10+ times a day after only being 1 day late for pmt, if I don't answer then they harass my Mother because she is a cosigner, they call from different numbers every time and even outside of their business hours. If I answer and tell them that I plan to make a payment they still call and harass me every day.”
- “Pioneer Credit Recovery, Inc. [a subsidiary of Navient] contacts our business multiple times every day in reference to a worker's personal debt despite being advised over and over that this is a business and our workers are not allowed to take personal phone calls on business lines.

The enforcement request also included—as just a few of many examples of the litigation filed against Navient for these abusive calls—descriptions of twenty-two cases detailing thousands of calls Navient made to individual consumers and their families, even after being requested to stop.²⁵

2017), (hereinafter Enforcement Request by NCLC) *available at* <https://ecfsapi.fcc.gov/file/106121158414766/Enforcement-Request%20Filed.pdf>.

²⁴ The enforcement request provides details of numerous instances in which Navient deliberately engaged in a campaign of harassing and abusing consumers through the use of repeated, unconsented-to robocalls, calling consumers’ cell phones hundreds, and—in some cases—thousands of times after being asked to stop. Many of these calls occur multiple times a day, often numerous times a week. These calls are frequently made to consumers while they are at work, even after they have explicitly explained to Navient that they cannot accept personal calls at work. Indeed, Navient’s internal policies permit up to eight calls per day in the servicing of student loan debt. *See, e.g.,* McCaskill v. Navient Solutions, Inc., 178 F. Supp. 3d 1281, 1286 (M.D. Fla. 2016).

²⁵ Enforcement Request by NCLC (June 12, 2017).

In the meantime, unfortunately, although one court has correctly interpreted the Budget Amendment not to be in effect yet because of the absence of regulations,²⁶ other courts are finding that the Budget Amendment is in effect without any FCC rules to protect consumers.²⁷

4. The Commission should revoke its *Broadnet* Ruling.

As we have stated in our Petition for Reconsideration,²⁸ our comments in support of our Petition for Reconsideration (on behalf of fifty national and state consumer and legal services groups),²⁹ and our most recent filings³⁰ in the current proceeding, the Broadnet Ruling³¹ is wrongly reasoned and wrong on the law. We will not repeat those points here, except to note the point discussed in the meeting about the ruling's conflation of the question of which entities are covered by the TCPA and whether some entities that are covered enjoy sovereign immunity from suit. The two issues are very different from each other. Whether a caller is a "person" subject to the provisions of the TCPA's consumer protections is a seminal determination premised on congressional intent and the language of the TCPA. Whether the caller is entitled to immunity from liability for damages for its violations of the TCPA's consumer protections is based on whether the caller's behavior falls within the entirely separate and largely judge-made doctrine of sovereign immunity. The Broadnet Ruling conflates the two issues in a confusing and dangerous way that renders very unclear all the rules governing robocalls from government contractors to cell phones.

²⁶ *Cooper v. Navient Sols., Inc.*, 2017 WL 1424346 (M.D. Fla. Apr. 21, 2017) (since the Budget Act amendment requires the FCC to adopt regulations to implement the amendment, it does not go into effect until those regulations are in place. In addition, there should be no question that the amendment does not immunize calls that were made before it was enacted).

²⁷ *Whalen v. Navient Sols., L.L.C.*, 2018 WL 1242020 (S.D. Ind. Mar. 9, 2018); *Schneider v. Navient Sols., L.L.C.*, 2018 WL 2739437 (W.D.N.Y. June 7, 2018); *Hassert v. Navient Sols., Inc.*, 232 F. Supp. 3d 1049 (W.D. Wis. 2017) (treating Budget Act amendment as effective immediately); *Weaver v. Navient Sols., Inc.*, 2017 WL 3456325 (N.D. Ohio Aug. 11, 2017) (applying exemption to calls that appear to have ended on April 24, 2015, six months before the Budget Act was passed, without providing a rationale); *Kesselman v. GC Servs. Ltd. P'ship*, 2016 WL 9185399 (C.D. Cal. Nov. 17, 2016) (Budget Act amendment became effective upon enactment, so immunizes post-enactment calls; since FCC's rules were not in effect then, they do not restrict those calls).

²⁸ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Petition of National Consumer Law Center et al. for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278 (filed July 26, 2016), available at <https://ecfsapi.fcc.gov/file/10726059270343/NCLC%20Petition%20for%20Reconsideration%20of%20Broadnet.pdf>.

²⁹ Comments in Support of the Petition for Reconsideration in furtherance of the Petition for Reconsideration filed by National Consumer Law Center on behalf of its low-income clients and fifty legal aid programs, and national, state and local public interest organizations, CG Docket No. 02-278 (filed Aug. 29, 2016), available at <https://ecfsapi.fcc.gov/file/10829228610098/Final%20Broadnet%20Comments%20in%20Support%20of%20Petition%20.pdf>.

³⁰ NCLC Primary Comments (June 13, 2018),

³¹ *Broadnet Ruling*, 31 FCC Rcd. 7394, 7401 ¶ 16 (F.C.C. July 5, 2016).

However, at this August 16th meeting we also discussed an issue brought up in a recent series of meetings between representatives of the Broadnet technology and various staff of the Commission.³² According to the *ex parte* filed about those Broadnet meetings (which we did not attend), the following point was made:

Moreover, Broadnet's government customers, and not Broadnet, make all decisions regarding whether to make a call, the timing of the call, the call recipients, and the content of the call. We explained further that Broadnet's government customer takes the steps physically necessary to initiate a telephone town call. Broadnet's limited involvement in any given telephone town hall call is intended to manage the technical aspects of the service and to ensure that its customers do not use the platform unlawfully. In other words, Broadnet's limited involvement is precisely to support the goals and purposes of the TCPA. Thus, while Broadnet enables telephone calls, it is not the maker of such calls.³³

The footnote to this quoted language notes that the Commission has interpreted the TCPA to only apply to "[A] person who dials the number of the called party or the number of a collect calling service provider in order to reach the called party, rather than the collect calling service provider who simply connects the call, 'makes' the call for purposes of the TCPA."³⁴

We think that there may be merit in this last point: that the service providing the technology that enables the calls by the government to be made is not a caller under the TCPA, and we urge the FCC to analyze whether this position is confirmed by its previous rulings.

If there are any questions, please contact Margot Saunders at the National Consumer Law Center (NCLC), msaunders@nclc.org (202 452 6252, extension 104).

This disclosure is made pursuant to 47 C.F.R. § 1.1206.

Thank you very much.

Sincerely,

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³² Meetings on July 26, 2018. *See*, <https://ecfsapi.fcc.gov/file/10727425417431/Broadnet%20Ex%20Parte%20for%207-24-18%20Meeting.pdf>.

³³ *Id.* at 2, (emphasis added).

³⁴ *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, FCC 15-72 ¶ 40.